IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-966

THE CITY OF PHILADELPHIA, FRANK L. RIZZO, and HILLEL LEVINSON, *Petitioners*

v.

RESIDENT ADVISORY BOARD OF PHILADELPHIA, *et al., Respondents*
[*Additional Respondents Listed Inside Cover*]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Additional Respondents

HOUSING TASK FORCE OF THE URBAN COALITION,

BERNICE DEVINE,

ESTHER SIERRA MENDEZ, JEAN THOMAS, MABLE SMITH, *(Plaintiff-Appellees below)*

THE PHILADELPHIA HOUSING AUTHORITY

MULTICON CONSTRUCTION CORP. and MULTICON PROPERTIES, INC.,

REDEVELOPMENT AUTHORITY OF CITY OF PHILADELPHIA,

WHITMAN AREA IMPROVEMENT COUNCIL,

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, RUSSELL BYERS, AND CARLA A. HILLS, *(Defendant-Appellants below)*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your petitioners, the City of Philadelphia, Frank L. Rizzo and Hillel Levinson respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this preceding on August 31, 1977.

OPINION BELOW

The opinion of the District Court is reported at 425 F. Supp. 987. The opinion of the Court of Appeals is not yet officially reported. Both opinions are set forth in a related Petition for Certiorari filed with this Court, namely, *Philadelphia Housing Authority v. Resident Advisory Board,*

et al., No. 77-761 of the October, 1977 Term of this Honorable Court. Appendix references made herein are to the appendix to that petition.

JURISDICTION

The judgment of the Court of Appeals, of which review is sought, was entered on August 31, 1977 (A.144-148). By order dated September 26, 1977 (A.149), the Court of Appeals denied the Petition for Rehearing timely filed by appellees below (respondents herein). This petition is timely filed on the first business day following the 90th day after denial of the Petition for Rehearing. *United States v. Healey,* 376 U.S. 75, 78 (1964). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

In considering whether actions or decisions of a governmental defendant abridge constitutional rights in violation of 42 U.S.C. §§1981 and 1982, must the Court consider whether such actions would still have occurred or whether such decisions would still have been made, absent any impermissible motivation?

STATUTORY PROVISION INVOLVED

42 U.S.C. §1981

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

STATEMENT OF THE CASE

A. *Procedural History*

Plaintiffs, (Respondents herein) in this class action sued various governmental and private defendants for alleged violations of the Thirteenth and Fourteenth Amendments of the United States Constitution, 42 U.S.C. §§1981, 1982, 1983, 1985, 1986, 2000(d) as well as Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601, et seq. The Class plaintiffs were certified as "all low income minority persons residing in the City of Philadelphia who, by virtue of their race, are unable to secure decent, safe and sanitary housing, outside of areas of minority concentration, and who would be eligible to reside in the Whitman Townhouse Project" (A.4). Plaintiffs also included several individuals who were allegedly desirous of moving into the Whitman area and several organizations active in the furtherance of equal housing opportunities. Defendants-appellants below were the City of Philadelphia (hereinafter City), City officials including the Mayor, Frank L. Rizzo, the Philadelphia Housing Authority (hereinafter PHA), the Philadelphia Redevelopment Authority (hereinafter RDA), and the Whitman Area Improvement Council (hereinafter WAIC). Defendants Multicon Construction Corp., Multicon Properties, Inc., the Department of Housing and Urban Development (hereinafter HUD), and officials thereof chose not to appeal to the Court of Appeals.

Essentially, plaintiffs sought to impose liability on defendants through the statutory and constitutional provisions enumerated above for various acts and non-actions in connection with the failure to construct the Whitman Park Townhouse Project. Plaintiffs demanded broad, mandatory injunctive relief including construction of the Project itself, funding of construction wherever necessary, and a comprehensive plan to desegregate the public hous-

ing system in Philadelphia. The District Court imposed liability upon the City defendants (The City, Mayor Rizzo and Managing Director Levinson, Petitioners herein) on a three-pronged theory: first, that the City failed to comply with a purported affirmative duty under Title VIII of the 1968 Civil Rights Act, particularly 42 U.S.C. §3608(d)(5), to promote and encourage the construction of public housing projects which would lessen racial concentration; second, that the activities of the City defendants in connection with halting the Whitman Park Project had a racially discriminatory effect violative of Title VIII of the 1968 Civil Rights Act and that the City's activities had not been justified by a compelling state interest; and third, that the City through its officials, acted with a racially discriminatory intent in attempting to halt construction of the Whitman Park Project. On November 5, 1976, the District Court, per the Honorable Raymond J. Broderick, issued its opinion and order requiring all defendants to take all necessary steps for the construction of the Whitman Park Townhouse Project as planned (A.275a). On appeal, the Third Circuit Court of Appeals affirmed the holding of the District Court that the City defendants had violated 42 U.S.C. §§1981 and 1982 by depriving plaintiffs of constitutional rights guaranteed by the Thirteenth and Fourteenth Amendments to the Constitution (A.116). The Court of Appeals did not consider the statutory bases of liability against the City defendants (A.116).

B. *Factual History*

This case centers on the construction of a federally funded, low income housing project in an urban renewal area of South Philadelphia, known as Whitman Park. The struggle between the various parties to this action began long before construction commenced on the Project in March 1971. In the early Spring of 1971, WAIC informed PHA that it was dissatisfied with the existing plans for

construction of the Whitman Project. WAIC decided to picket construction of the Project in March of 1971. Throughout the Spring and into the Summer of 1971, members of the Whitman community picketed the site in varying numbers. There were frequent threats made to laborers, causing the contractor, Multicon, to request aid from the Philadelphia Police Department. During these demonstrations in the Spring of 1971, the Civil Disobedience Unit of the Philadelphia Police Department was frequently on the scene in an effort to insure safe movement of laborers and material to the job site.

In April, Multicon went to the Common Pleas Court of Philadelphia County and obtained an injunction against WAIC's picketing and a writ of assistance to enforce that injunction. Additionally, at the suggestion of the Common Pleas Court, negotiations were started among all relevant parties; *i.e.* PHA, RDA, Multicon and WAIC. Nevertheless, as the result of the demonstrations and continued picketing, very little construction ever occurred at the job site. Complicating the situation were Multicon's demands for large numbers of police to be detailed to the job site whenever Multicon desired to work on the project. Multicon was advised that whatever police protection they needed, would be provided as the situation arose, but Multicon was further reminded that the Philadelphia Police Department was not their private security force (Appendix for Court of Appeals, 362a).

During the Fall of 1971, defendant Rizzo was campaigning for Mayor of Philadelphia. During that time he publicly and consistently took the position that, within the framework of the law, he would support any local community in their opposition to public works projects intended to be placed in such communities. (A.1232a). As candidate, defendant Rizzo also announced his support for the Whitman community in their opposition to the Whitman Project both publicly and in a private phone call to Fred Druding, President of WAIC.

During early 1972, after defendant Rizzo was elected Mayor, Multicon met with City and HUD officials to attempt to resolve the Whitman Park problem. At the same time, WAIC was meeting with the City. Eventually, Multicon wrote to Deputy Mayor Philip R. T. Carroll on June 20, 1972, stating that construction would again be attempted. Carroll turned the letter over to the then Chief Deputy City Solicitor, Sheldon L. Albert, who moved for and obtained a preliminary injunction halting construction of the project. The decision to seek the preliminary injunction was based upon information from the Police Department that renewed efforts at construction of the project would cause substantial violence and massive civil disorder (Appendix for Court of Appeals, 859a, 866a, 871-2a, 2184-86a). No significant construction was ever completed at the site from March of 1971 until the present. The District Court held that the City's efforts in supporting the Whitman community in opposition to the project and in seeking a preliminary injunction to halt the resumed construction of the project, violated the statutory and constitutional rights of the plaintiffs.

REASONS FOR GRANTING THE WRIT

1. The courts below failed to consider recent relevant opinions of this Court in determining that petitioner violated 42 U.S.C. §§1981 and 1982.

It is submitted that the decision of the Court of Appeals to affirm the District Court's holding that the City defendants violated the constitutional rights of plaintiff is in error since neither considered this Court's opinion in *Mt. Healthy City School District v. Doyle*, —— U.S. ——, 50 L.Ed. 2d 471 (1977). Even assuming that the Appeals Court was not in error in affirming the District Court's finding of discriminatory intent,[1] the Court erred in failing to consider whether the actions of the City defendants would have differed had there been no impermissible motivation.

In the *Mt. Healthy* case, this Court articulated the appropriate test for imposition of liability in a situation where an impermissible motive is alleged to have played a part in a governmental official's decision to embark on a particular course of action. Plaintiff in that case was a former teacher who had been denied tenure. The District Court had held that if an impermissible motive had played a substantial part in the School Board's decision not to grant tenure, then, even in the face of other permissible grounds for the Board's action, the decision could not be upheld. This Court reversed, formulating the proper test as follows:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was consti-

1. The district court's findings on this point are inconsistent, if not irreconcilable. Compare findings that the Mayor's policies with respect to the Whitman Project were color blind rather than racially motivated [A.61, 425 F. Supp. 987, 1019] with findings that the Mayor's policies were, at least in part, motivated by racial intent [A.75, 425 F. Supp. 487, 1025].

tutionally protected, and that his conduct was a 'substantial factor'—or to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. [footnotes omitted] —— U.S. ——, 50 L.Ed. 2d 484.

In the context of a low income housing case, this same test was applied in the *Arlington Heights* decision. There, this Court stated at —— U.S. ——, 50 L.Ed. 2d 468, n. 21:

> Proof that the decision by the Village [not to rezone] was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances there would be no justification for judicial interference with the challenged decision.

Not having the advantage of the *Mt. Healthy* and *Arlington Heights* decisions at the time it issued its opinion in the instant matter, the lower court erroneously required the City to demonstrate a compelling state interest justifying its actions.[2] In the instant case, the District Court

2. On appeal it of course made no difference that the opinion and order of the District Court preceeded the *Mt. Healthy* and *Arlington Heights* decisions. Where a new rule of law is announced

should have first determined whether racial motivation played a "substantial part" in the City's actions with respect to the Whitman Park Project, and, if it did, decide whether those same decisions would have been made had there been no impermissible (*i.e.*, racial) motivation. The evidence clearly shows that the Mayor's decision to support the Whitman community in opposition to the project would have been made regardless of any impermissible motivation and that the decision to file for an injunction on June 22, 1972, would also have been made regardless of impermissible motivation. The decision to support the Whitman community in its opposition to the Whitman Park Project was made by defendant Rizzo during his mayoral campaign, and this promise subsequently ripened into an administration policy when Mayor Rizzo assumed office. Setting aside for the moment the District Court's finding that the promise and subsequent policy were color blind and made without regard to race [A.617], and further assuming arguendo that the Mayor was in substantial part motivated by an independent racial animus of his own,[3] the decision to support the community would still have been made regardless of impermissible motivation. The testimony of Mayor Rizzo, introduced by plaintiffs as part of their case, clearly demonstrates that the administration's policy was to support *any neighborhood community in opposition to a public works project.* Given this policy, applicable in white and black neighborhoods and applica-

Footnote 2 Continued

by the United States Supreme Court after a district court has ruled but before the appellate court has reviewed, the new rule of law must be applied by the appellate court, if this Court fails to limit the substantive scope of the new rule to purely prospective cases. *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 281-2 (1969).

3. It should be remembered that both courts below found that the defendant Whitman Area Improvement Council (WAIC) and the Whitman community in general were not racially motivated in their opposition to the Whitman project [A.73].

ble with respect to any type of public works project, the decision to support the Whitman community in opposition to the Whitman Park Project would have been made pursuant to that policy, regardless of the presence or absence of any discriminatory animus on the part of the Mayor.

The second major decision made by City officials regarding construction of the Whitman Park Project, was that the City obtained a preliminary injunction enjoining defendant Multicon from resuming work on the project for a period of five days. Given the experience of the 1971 demonstrations against the project, including the vandalism and violence which occurred, and in the face of Police Department projections of even more severe civil strife should construction of the project have resumed in the Summer of 1972, and given the further evidence from non-police sources of the potential for violent civil disorder should construction resume, the City had more than ample reason, apart from any impermissible motive, to attempt to halt the project.

The decision to seek the preliminary injunction in June 1972 was made by the then Chief Deputy City Solicitor (now City Solicitor) Sheldon L. Albert. He testified that when he received a copy of a letter from Multicon in June 1972 (outlining their plan to resume construction), he believed Multicon was ready to proceed with construction. He was clearly aware of the previous history of violence on the construction site and the potential for further violence. He had reviewed a report (Plaintiffs' Exhibit P-91) prepared by the Police Department entitled "Whitman Area Project—If Construction Resumes." This report stated that ". . . the potential for violence to erupt in the Whitman Park area . . . if construction resumes on the low income housing being developed in that area is an almost certain fact." The report further noted the availability of "piles of broken concrete, bricks, stones and other types of materials that can be used as missiles or weapons" and that in spite of the presence of some 800 police on the scene, residents

would "still attempt to forcibly shut down the operation" and confront police. Police intelligence sources believed that longshoremen would be imported to assist in confronting police at the site and threats had been made indicating a " 'blood bath' if any construction was attempted."

When this projection is compared with the testimony from Whitman residents that violence and vandalism did occur, to the point of actually placing dynamite on the site, it is clear that the City was presented with an extraordinarily volatile situation. It is also clear that a city, when faced with such volatile circumstances, may react to it for the benefit of the welfare of its citizens by abrogating the threat to the public welfare. *Palmer v. Thompson,* 403 U.S. 217 (1971).

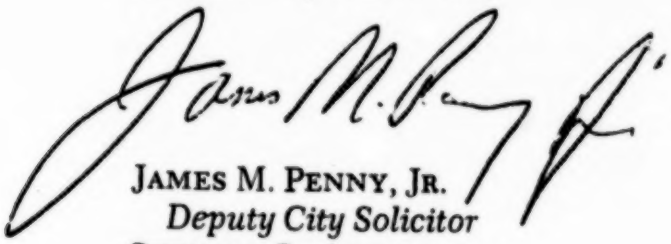
Therefore, although there is no factual basis in the District Court's opinion or in the evidence for supposing that the defendant City officials, or any of them, acted with any discriminatory motivation whatsoever with respect to their decisions regarding the Whitman Park Project, even upon assuming that the findings of fact support an ultimate finding that discriminatory motivation on the part of said officials was a "substantial factor" in those decisions (an ultimate finding which was never made), the decisions nevertheless would have been made regardless of the presence or absence of constitutionally impermissible reasons.

It is respectfully submitted that the Court of Appeals should have remanded the case back to the District Court with instructions to consider the constitutionality of the actions of the City and its officials in light of this Court's opinion in *Mt. Healthy City School District v. Doyle, supra.*

CONCLUSION

For the foregoing reasons, your petitioners respectfully submit that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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